STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2012
v	No. 304176 Ingham Circuit Court
SHAWN EDWARD FOSTER, Defendant-Appellant.	LC No. 10-000808-FC

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables), and the trial court sentenced defendant as a second-felony offender, MCL 769.10, to concurrent prison terms of 13 years and 4 months to 25 years. Defendant appeals as of right. We affirm defendant's convictions but remand for the ministerial task of correcting the presentence investigation report (PSIR).

The complainant, defendant's then 16-year-old daughter, testified that defendant allowed her to drink alcohol and shared some marijuana with her one night in 2010. She indicated that she became so intoxicated that she had bouts of vomiting and lost consciousness. Defendant allegedly fondled her breasts while cleaning her up, and subsequently took off her clothes, positioned her on her bed, and then penetrated her vagina first with his finger and then with his penis. Defendant admitted allowing the complainant to consume alcohol, but denied sharing his marijuana with her or touching her inappropriately.

Defendant argues that certain comments made by the trial court in front of the jury denied him a fair trial. A trial judge must act as a neutral and detached judicial officer. See *Cain v Dep't of Corrections*, 451 Mich 470, 509; 548 NW2d 210 (1996). However, a judge has the discretion to intervene in the presentation of evidence for the purpose of clarifying testimony or eliciting additional relevant information. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). See also MRE 614(b) (the court may interrogate witnesses). But a trial judge "must avoid any invasion of the prosecutor's role and must exercise caution so that his questions will not be intimidating, argumentative, prejudicial, unfair, or partial." *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). "The test for whether a new trial should be ordered is whether the judge's questions and comments may well have unjustifiably aroused

suspicion in the mind of the jury as to a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *Id.* at 91-92.

At issue was whether the complainant had been consistent in her accounts of whether defendant had fondled her breasts while washing her. On cross-examination, defense counsel and the complainant had the following exchange:

> *Q.* You stated on direct examination today . . . he was fondling your breasts while washing you?
>
> *A.* Yeah.
>
> *Q.* Have you previously reported that to the police?
>
> *A.* Previously as in?
>
> *Q.* You made a police report at some point, correct?
>
> *A.* Yes, about the whole situation and not single handedly.
>
> *Q.* And you told them that, correct?
>
> *A.* Yeah.
>
> *Q.* Are you certain of this?
>
> *A.* Yes.
>
> *Q.* You made a report to the nurse, as well, correct?
>
> *A.* Yes.
>
> *Q.* And you told her that?
>
> *A.* Yup.
>
> *Q.* You are certain?
>
> *A.* Yes.

The prosecuting attorney attempted to further develop this issue through direct examination of the sexual assault nurse examiner who examined the complainant:

> *Q.* Let me know if you don't recall specifically, but during that oral interview—I don't want to go through the whole thing. I want to focus on just one detail. Did she tell you that after she vomited her father fondled her breast?
>
> [DEFENSE COUNSEL]: Objection, calls for hearsay and improper foundation for this particular question.

* * *

[PROSECUTING ATTORNEY]: Your Honor, it is a prior consistent statement. It was insinuated on cross-examination [of the complainant] that she had not previously reported this.

THE COURT: I believe you did say that, didn't you?

[DEFENSE COUNSEL]: It's not a prior inconsistent statement by [the witness]. I am confused as to what—

THE COURT: He is saying that you inferred by the questions you asked that the young lady gave a different statement on that issue. Although you never attempted to introduce the statements, you made every implication that that is what happened, so I think in all fairness he has a right to point that out, if, in fact, it's the facts.

[DEFENSE COUNSEL]: But it doesn't come in as evidence, Your Honor.

THE COURT: It comes in to show that what you intimated wasn't proved.

[DEFENSE COUNSEL]: And my statements aren't—my questions aren't evidence, Your Honor.

THE COURT: I understand that is your statement, but let me explain to you. When you intimate a position and choose not to finish it and leave the impression with the jury, he has a right to clean that up and so you are just digging the hole deeper there.

[DEFENSE COUNSEL]: Thank you, Judge.

THE COURT: The objection is overruled. Go ahead, please.

The prosecutor went on to elicit from the witness that the complainant had in fact reported that defendant had fondled her breast after she had vomited on herself.

Defendant argues that the trial court's statements during this examination improperly threw the credibility of both defense counsel and defendant into doubt. We disagree.

Defense counsel's questioning of the complainant suggested that the complainant might not have been consistent in telling a key part of her story. It appears that defense counsel believed that the rule that attorney's questions are not evidence would insulate such suggestions from the prosecution's further evidentiary development in that regard. However, defense counsel is properly deemed to have opened the door to the prosecutor's in-kind rehabilitation of the complainant in that regard. In responding to defense counsel's objection to the prosecutor's line of questioning, the trial court pointed out to both defense counsel and the jury that defense

counsel suggested by his questioning that the complainant's accounts may not have been entirely consistent. The trial court took pains to distinguish what was actually in evidence from counsel's mere suggestions. The court thus interjected itself in order to add relevant information for the jury's benefit. See *Weathersby*, 204 Mich App at 109. Doing so neither destroyed the credibility of defendant or his attorney, nor otherwise signaled an improper bias on the court's part. See *Ross*, 181 Mich App at 91-92.

Moreover, to the extent that any such hazard may have come about, the trial court's instructions to the jury to decide the case solely on the basis of the evidence, and that the court's own comments or questions were not evidence, should have avoided any unfair prejudice in the matter. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). For these reasons, we reject this claim of error.

Defendant alternatively points out that the trial court agreed to make some changes to defendant's PSIR at sentencing, but that those change were never made. Defendant asks that this Court remand this case to the trial court for the ministerial purpose of completing that task. Specifically, defendant objected that the PSIR stated that defendant had violated probation on "several" occasions, when in fact he had done so only once. In the absence of a prosecutorial objection, the trial court said "[s]o noted," and asked if there were other corrections. Defense counsel then complained that the PSIR stated that defendant had failed to pay costs attendant to probation when in fact had paid those costs. The trial court answered, "Okay. I'll put down, says he paid them." The prosecution confesses error in this regard. We agree that remand is appropriate. See *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986).

Affirmed, but remanded for correction of the PSIR consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher